

June 20, 2012

Helen Holmes Peak
HELEN HOLMES PEAK & WENDY L. HOUSE
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Re: Your Request for Advice
Our File No. A-12-094

Dear Ms. Holmes Peak:

This letter responds to your request for advice regarding the behested payments provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented in your request. The Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, this letter should not be construed as assistance on any conduct that may have already taken place (see Regulation 18329(b)(8)(A)).

QUESTIONS

1. Is an elected officer “featured” on a solicitation, such that reporting requirements apply, when the elected officer is listed as a chair, as a sponsor, and/or within the sponsor section of a solicitation, but not singled out or emphasized relative to other sponsors listed?
2. Do reporting requirements only apply when an elected officer personally solicits contributions on behalf of a charitable organization?
3. Does the inclusion or omission of the Councilmember title of the elected officer in a roster or list of sponsors, where the elected officer’s name is otherwise not singled out, affect whether the behested payments reporting requirements apply?
4. Is the reporting requirement limited to mailed solicitations, or does it also include solicitations that are e-mailed, posted online, and/or handed out in person?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. The specific formatting of the letter and the manner of displaying the elected officer's name, rather than whether the elected officer is listed as a chair, sponsor, or on a roster, will determine whether or not an elected officer is "featured" on a solicitation, as discussed below.
2. Payments made in response to a fundraising solicitation from a charitable organization are subject to behested payments reporting requirements when the elected officer actually behests the payment and a reasonable person would perceive the solicitation is from or on behalf of the elected officer.
3. If merely listed in roster format, including the elected officer's Council title will not trigger reporting requirements where the elected officer's name is otherwise not singled out and elected officers do not make up a majority of the roster.
4. The behested payment reporting requirement applies to all communications, regardless of the delivery method, that solicit payments for legislative, governmental, or charitable purposes and that feature an elected officer.

FACTS

You serve as the City Attorney of the City of San Marcos and are requesting advice on behalf of the City Council. You seek formal advice regarding recently adopted Regulation 18215.3, effective May 10, 2012, which, in relevant part, clarifies the definition of "made at the behest of" and states a limited exception to the behested payments reporting requirements for donations made in response to a nonprofit organization's fundraising letter where an elected officer's name is present on the solicitation. Generally, you ask under what circumstances a behested payment must be reported when an elected officer's name is present on a solicitation for a charitable organization's fundraiser. More specifically, you ask whether including the elected officer's position in the organization or the elected officer's Councilmember title on the solicitation affect reporting requirements. You also ask whether Regulation 18215.3 applies to solicitations that are sent by email, posted online, or handed out in person, in addition to those that are mailed.

Along with your advice request, you included a sample fundraising letter soliciting payments for a charitable auction benefitting the Boys & Girls Club of San Marcos. The letter was signed by three people designated as auction co-chairs. Two of the three signers were council members. These three names were listed again in roster format in the right-hand column under the heading "Auction Committee." You ask the Commission whether similar future solicitations would trigger behested payments reporting requirements.

ANALYSIS

Pursuant to Section 82015(b)(2)(B)(iii), payments made principally for legislative, governmental, or charitable purposes of \$5,000 or more (in the aggregate from the same source) in the same calendar year must be reported within 30 days when made at the behest of an elected officer. The purpose of the “behested payment” reporting requirements “is to capture reporting for payments that are not direct contributions to elected officials, but payments in which the public would have an interest,” given the officials’ role in the exchange. (Memorandum Re: Adoption of Proposed Regulation 18215.3 – Behested Payment Reporting, February 27, 2012.) Regulation 18215.3(a) states that a payment is made at the behest of an elected officer when it is “made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the elected officer.”

Regulation 18215.3 creates a limited exception to the behested payments reporting requirements under Section 82015(b)(2)(B)(iii) for payments made in response to a nonprofit organization’s fundraising letter in some cases where an elected officer’s name is present on the solicitation. The exception provides that where the payment is made in response to a fundraising solicitation from a charitable organization, the payment is not made at the behest of an elected officer when the solicitation does not “feature” the elected officer. (Regulation 18215.3(b).) A solicitation “features” an elected officer when it “includes the elected officer’s photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color,” or when the “roster or letterhead listing the governing body contains a majority of elected officers.” (Regulation 18215.3(b).)

1. Is an elected officer “featured” on a solicitation, such that reporting requirements apply, when the elected officer is listed as a chair, as a sponsor, and/or within the sponsor section of a solicitation, but not singled out or emphasized relative to other sponsors listed?

Generally, no. The elected officer’s specific position within the organization as a chair or sponsor does not determine whether reporting requirements will apply. Instead, an elected officer should evaluate his or her duty to report based on the criteria specified in the regulation. As long as a solicitation does not include the elected officer’s photograph or signature, single out the elected officer by means of the formatting and design of the solicitation, or include the elected officer in a list of members of a body where a majority is elected officers, then the elected officer is not featured and is not required to report payments made to the charity in response to the solicitation.

For example, the solicitation letter you included with your inquiry as a sample document contains two separate grounds for concluding that the letter “features” elected officers. First, the letter is signed by two council members, which means they are clearly featured as defined in the plain language of Regulation 18215.3(b)(1). Second, the two council members are listed as co-chairs of the auction committee in the right column. Because they make up a majority of the

listed group, they are also considered featured under Regulation 18215.3(b)(2). Payments of \$5,000 or more from a single source made in response to a solicitation like this must be reported as behested payments. This conclusion would be the same regardless of whether the elected officers were sponsors, board members, committee members, or members of any other similar group. (See *Filchev* Advice Letter, No. I-09-073.)

2. *Do reporting requirements only apply when an elected officer “personally solicits” contributions on behalf of a charitable organization?*

Generally, no. The behested payments reporting rules cover payments of \$5,000 or more from a single source made at the behest of an elected officer. (Section 82015(b)(2)(B)(iii).) When a payment is made in response to a fundraising solicitation from a charitable organization, the elected official must be “featured” on the solicitation before reporting requirements are triggered. The test, then, for determining whether an elected officer is subject to reporting requirements in this context is based on two things: (1) the elected officer’s actual actions or involvement with the charitable organization, and (2) the impression the solicitation would make on a reasonable person. (See *Filchev* Advice Letter, No. I-09-073; *Regulation* 18215.3.)

As noted previously, a payment is “made at the behest of” the elected officer if it is made in response to a communication that was transmitted under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the elected officer. This definition includes personal solicitations by the elected officer, but also encompasses less active roles. For example, behested payments reporting rules may apply when an elected officer signs a non-profit organization’s fundraising letter, when an elected officer has his or her chief-of-staff solicit contributions for a nonprofit organization, or when an elected officer merely consents to being otherwise “featured” in a solicitation.

The second part of the test looks not at the elected officer’s actual level and kind of involvement in the solicitation, but rather at whether an elected official is “featured” on the solicitation such that a reasonable person could conclude, by examining the manner and context in which the elected officer’s name is displayed, that the item was from or on behalf of the elected officer. Regulation 18215.3(b) specifies certain identifiable elements that would lead a reasonable person to believe the solicitation was from or on behalf of an elected officer, such as including the elected officer’s photograph or signature, or otherwise singling out the elected officer’s name through the use of formatting and design. (See Memorandum Re: Adoption of Proposed Regulation 18215.3 – Behested Payment Reporting, February 27, 2012; *Filchev* Advice Letter, No. I-09-073; *Regulation* 18215.3(b).)

3. Does the inclusion or omission of the Councilmember title of the elected officer in a roster or list of sponsors, where the elected officer's name is otherwise not singled out, affect whether the behested payments reporting requirements apply?

Generally, no. Where the manner of displaying the elected officer's name does not otherwise convey the impression that the solicitation is from or on behalf of the elected officer, merely adding an official title on a solicitation does not affect whether the elected officer could appear more or less singled out to a reasonable person. Just as adding the prefix "Dr." or "Professor" to a name that appears on a list of sponsors would not by itself lead one to believe that the solicitation was sent from or on behalf of that individual, adding the prefix "Councilmember" to a name would not by itself change a reasonable person's impression of from whom the item was sent simply because the individual is an elected officer. The only exception to this is where a majority of the names listed under a board, committee, or a similar group are in fact elected officers.

4. Is the reporting requirement limited to mailed solicitations, or does it also include solicitations that are e-mailed, posted online, and/or handed out in person?

The reporting requirement is not limited to solicitations that are mailed. Rather, behested payments reporting requirements apply to communications, regardless of the delivery method, that solicit payments for legislative, governmental, or charitable purposes and which feature an elected officer. (See Section 82015(b)(2)(B)(iii).) This includes solicitations that are e-mailed, posted online, and handed out in person.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Lindsey Nakano
Legal Intern, Legal Division

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